Supreme Court, U. S.
FILED
NOV 28 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

NO. 77-612 OCTOBER TERM, 1977

UNITED MINE WORKERS OF AMERICA,
Petitioner,

v.

CHARLES NEDD, DOMINIC IERO, MAX DYNOSKI and ANTHONY GANLY, Members of the Pensioned Anthracite Coal Miners Protest Executive Committee, suing on behalf of Themselves and All Other Members of the CLASS OF PENSIONED ANTHRACITE COAL MINERS AND WIDOWS OF DECEASED PENSIONED ANTHRACITE COAL MINERS,
Respondents,

and

EMMETT THOMAS, MART F. BRENNAN, AND JOHN JILLSON, Trustees of the Anthracite Health and Welfare Fund.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

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Respondent pensioned miners seek in this action redress for the wrongs inflicted on their pension fund by their Union. The pensioners averred and proved, and the District Court found, that the UMW for two decades dominated the management of the Fund in violation of federal law, that the UMW trustees in a conflict-of-interest situation breached their fiduciary duties, and that large sums of mine operator pension fund contributions were thus lost. The District Court nevertheless concluded that the pensioners had failed to sustain their federal claims and that it was without power to consider the pensioners' pendent state claims.

The Court of Appeals, without dissent, vacated and remanded for further proceedings, holding that the pensioners had averred and shown federal claims of sufficient substance to support the exercise of pendent jurisdiction over the pensioners' state claims and that the District Court had misapplied the burden of proof under the facts of this case. The UMW now seeks review of that nonfinal decision.

REASONS FOR DENYING THE WRIT.

I. The UMW in its 50-page Petition, never once mentioning "pendent jurisdiction", the holding in the Court of Appeals, ascribes to that decision a content, breadth and public importance which it does not have, and, by isolating *dicta*, attempts to conjure up conflicts with decisions of this Court and other Courts of Appeals where no meaningful conflict exists 4

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QUESTIONS PRESENTED

1. Should this Court exercise its certiorari power to review a carefully restricted finding of pendent jurisdiction under the unusual facts of this case, where there is no meaningful conflict with any decision of this Court or other Courts of Appeals, and where the advent of ERISA has so changed the federal statutory scheme regarding pension funds as to render prospective application of the decision below unlikely in the extreme?

2. Did not the Court of Appeals, after 14 years of litigation, three separate refusals to dismiss by the District Court, a prior finding of probable federal question jurisdiction by the Court of Appeals, a trial and decision on the merits, and the finding by the District Court that the federal labor laws had been violated, correctly hold that the pensioners' federal claims were not so frivolous as to afford an insufficient predicate for pendent jurisdiction?

STATEMENT OF THE CASE

This action was commenced in 1963 by respondents ("pensioners") as a diversity action against the petitioner Union ("UMW"). The action was later dismissed for lack of diversity, and recommenced by the pensioners in 1965 with jurisdiction predicated upon § 301(a) of the Labor-Management Relations Act of 1947, 29 U.S.C. § 185(a) ("LMRA"). The essence of the pensioners' claim was that the UMW had breached the duty owed its retired members by failing properly to enforce the collective bargaining agreement with the anthracite mine operators ("operators"), in that there had been a pervasive failure by the operators to pay the agreed amounts to the Anthracite Health and Welfare Fund ("Fund") for pensions, and the UMW had deliberately tolerated those breaches. The UMW's motion to dismiss the 1965 complaint was denied, renewed, and denied again. Thereafter the UMW was granted a certificate under 28 U.S.C. § 1292(b) and the Court of Appeals (at 400 F.2d 103) held that the pensioners had incorrectly asserted jurisdiction under LMRA § 301, but that the pensioners' claim could be cognizable under 28 U.S.C. § 1337 as a breach of the duty of fair representation in light of *Vaca* v. *Sipes,* 386 U.S. 171 (1967).

Upon remand in 1969 the pensioners filed an amended complaint asserting jurisdiction under, *inter alia,* 28 U.S.C. § 1337 (breach of the duty of fair representation), LMRA § 301, 29 U.S.C. § 185 (breach of a collective bargaining agreement) and LMRA § 302, 29 U.S.C. § 186 (breach of the "equal representation" and "sole and exclusive benefit" requirements). The UMW again moved to dismiss, and at the conclusion of discovery in the spring of 1974, renewed its motion. On June 19, 1974, the District Court again refused to dismiss, and the trial was had non-jury the following month.

The evidence, which was almost exclusively documentary and largely undisputed, showed, and the District Court found, that for more than two decades (from 1946 through 1967, at least) the UMW had dominated and controlled the management of the Fund (154a)[1], that there had been a "clear" (76a) violation of the equal representation requirement of LMRA § 302(c)(5), 29 U.S.C. § 186(c)(5), since two of the three trustees managing the Fund had at all times been high UMW officers, that the UMW trustees had breached their fiduciary duties by failing diligently to collect the royalties owed to the Fund (140a), that the Fund trustees had abdicated their collection responsibility to the UMW which had "unhesitatingly accepted" (68a) such responsibility, and that the UMW and the UMW's trustees, who had a conflict of interest (122a), were reluctant to take vigorous enforcement action because it might result in working miners losing their jobs. Despite these findings, the District Court decided that federal question jurisdiction had not been shown and that it lacked power to consider the pensioners' pendent state law claims. Nevertheless, it did go on to consider the pensioners' claims and found for the UMW, holding that the pensioners had failed to sustain their burden of proof as to the UMW's liability.

The Court of Appeals vacated the District Court's judgment, and remanded for further proceedings in the light of the fiduciary standards of conduct and burden of proof set forth in its opinion. 556 F.2d 190. The UMW next filed a Petition for Rehearing and Suggestion for Rehearing *in Banc,* which was denied. It then filed the instant Petition for a Writ of Certiorari.

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[1] Record citations are to the Appendix in the UMW's Petition.

REASONS FOR DENYING THE WRIT

I. THE UMW IN ITS 50-PAGE PETITION, NEVER ONCE MENTIONING "PENDENT JURISDICTION", THE HOLDING IN THE COURT OF APPEALS, ASCRIBES TO ITS DECISION A CONTENT, BREADTH AND PUBLIC IMPORTANCE WHICH IT DOES NOT HAVE, AND, BY ISOLATING DICTA, ATTEMPTS TO CONJURE UP CONFLICTS WITH DECISIONS OF THIS COURT AND OTHER COURTS OF APPEALS WHERE NO MEANINGFUL CONFLICT EXISTS.

The essential holding of the Court of Appeals, with respect to jurisdiction, was that the pensioners had shown federal claims of sufficient substance to afford a basis for the exercise of pendent jurisdiction over pensioners' state law claims. (29a) On the merits, the Court held that, under either federal or state law, when a union supplants pension fund trustees, arrogates to itself their functions and assumes their duties, and those duties are improperly discharged, a basis for liability has been shown. (42a)

Neither of these holdings is in the least surprising, or constitutes any departure from, or expansion of, existing law. Rather they represent the application of well-settled principles to the peculiar facts of this case.

The UMW in its Petition determinedly ignores the narrow reach of the Court's holding, and attempts to characterize it as one which will open the floodgates to massive federal court intervention in the management of pension trusts, thus evidencing a predisposition (Petition, p.50) on the part of the Court of Appeals to find against the UMW. By selecting isolated *dicta* from the Court's analysis, the UMW contends that conflicts exist with two decisions of this Court, *Allied Chemical & Alkali Workers of America, Local Union No. 1* v. *Pittsburgh Plate Glass Co., Chemical Division,* 404 U.S. 157 (1971) and *Arroyo* v. *United States,* 359 U.S. 419 (1959), and with several decisions of other Courts of Appeals. It is submitted that neither the contentions made, nor the extravagant apprehensions voiced, have any basis in law or in fact.

A. The Court of Appeals carefully limited its holding to a finding of the existence of pendent jurisdiction.

The Court of Appeals in its Opinion analyzed the three bases for federal question jurisdiction asserted by the pensioners, i.e. breach of the duty of fair representation, and LMRA §§ 301 and 302. The UMW alleges that the Court of Appeals *held* that jurisdiction existed under each of these theories.

But this mischaracterizes the holding of the Court below. It is understandable, given the strictures of Rule 19 and the nature of a Petition for Writ of Certiorari, that the UMW would want to exaggerate the breadth and potential impact of the decision below, but the exaggeration here is egregious.

At no less than six separate points in its decision, the Court below emphasized that it was holding *only* that the pensioners' federal claims were sufficiently non-frivolous to support the exercise of pendent jurisdiction. (6a, 11a, 15a, 19a, 28a and 29a) The limitation with respect to a finding only of pendent jurisdiction was made in the context of LMRA § 301 (11a), § 302 (19a) and fair representation (15a). In sum, the Court below held: "We conclude that in the circumstances of this case federal law causes of action of sufficient substance to support federal question jurisdiction were pleaded. Moreover, we conclude

that the Court could properly, as ultimately it did, try the pendent state law causes of action." (6a)

B. Because of the enactment of ERISA, establishing a comprehensive federal regulatory scheme, including provisions establishing exclusive federal court jurisdiction over, and superseding all state laws relating to, pension funds, the Court of Appeals' analysis as to the jurisdictional reach of the Taft-Hartley Act with respect to breaches of fiduciary duty by union-controlled pension fund trustees is wholly lacking in prospective significance.

The UMW in its Petition complains that the holding of the Court of Appeals opens the way for establishment of a federal common law of pension and welfare trust fund administration, and thus constitutes an enormous expansion of federal court jurisdiction over pension fund affairs.

It is true that, in analyzing pensioners' claims under the Taft-Hartley Act to determine whether they had sufficient substance to support the exercise of pendent jurisdiction, the Court of Appeals expressed views supporting the proposition that, under the circumstances of this case, jurisdiction under the Taft-Hartley Act existed. However, since the holding of the Court of Appeals was expressly limited to a finding only of pendent jurisdiction, which required a finding only that the federal claims asserted by pensioners were non-frivolous, any views going beyond a finding of non-frivolity constitute mere *dicta*.

Nevertheless, assuming *arguendo* that the Court of Appeals held that jurisdiction had been shown under the Taft-Hartley Act, it would constitute a holding without prospective importance.

The Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 *et seq.*, has worked a radical transformation of the federal law applicable to pension funds. Even the UMW concedes (Petition, p.37, n.25) that ERISA establishes "pervasive pension regulations including fiduciary standards and federal jurisdiction to remedy violations of that statute and regulations."

ERISA clearly applies to Taft-Hartley pension trusts. See § 1002(1) and § 1003. ERISA defines a "fiduciary" with respect to a pension fund, under § 1002(21)(A), as a person who exercises authority or control respecting management or disposition of its assets, a definition which would have applied to the UMW under the circumstances of this case had ERISA then been in effect. Moreover, under ERISA a fiduciary is liable for the breach of duty of a co-fiduciary if he knows of the breach and fails to make reasonable efforts under the circumstances to cure the breach. § 1105.

Under § 1104, ERISA federalizes the fiduciary obligations of pension fund trustees, and under § 1109 creates a cause of action, including a damages remedy, for breach of fiduciary duty. Lastly, under § 1132(e)(1) ERISA vests exclusive jurisdiction in the federal courts over civil actions brought to recover damages for breach of fiduciary duty.

Whatever may have been the state of the law prior to the enactment of ERISA in 1974, it is clear that the type of claim asserted by the pensioners in the instant action, when arising in the future, will fall within the coverage of ERISA. Thus, even assuming that the Court of Appeals' decision has the breadth and content regarding the jurisdictional reach of the Taft-Hartley Act over breaches of fiduciary duty by union-dominated pension fund trustees ascribed to it by the UMW, it is without prospective significance. The statutory changes wrought by ERISA will preclude this issue arising in the future and review by this Court, even assuming that the UMW's

characterization of the Court of Appeals' decision is accurate, is not therefore warranted.

C. There is no conflict here with any decision of this Court.

The UMW asserts that the Court of Appeals' decision conflicts with this Court's decision in *Arroyo* v. *United States,* 359 U.S. 419 (1959), pointing to the observation of Justice Stewart (at 427): "The legislative history is devoid of any suggestion that defalcating trustees were to be held accountable under federal law, except by way of the injunctive remedy provided in that subsection [§ 302(e)]".

Arroyo involved the question as to whether the trustee of a welfare fund, who embezzled money from the fund, had committed a crime in violation of § 302(b). This Court examined the language of the statute and noted that it prohibited unlawful payments to welfare funds, but that payments lawfully made to the fund and later embezzled did not fall within the prohibition of the Act. In reaching this conclusion the Court examined the legislative history and noted Congress' express concern "with the possible abuse by union officers of the power which they might achieve if welfare funds were left to their sole control." (at 426) Embezzlement, however, had not been one of the express concerns of Congress, and it was in this context that the above-quoted observation of Justice Stewart was made. The instant case is not a criminal action, but is rather a civil action seeking redress for the UMW's violation of § 302, by dominating and controlling the Fund for its own purposes, precisely the "abuse by union officers of the power which they might achieve if welfare funds were left to their sole control" which this Court found to be the particular focus of Congressional concern. (at 426)

The UMW also asserts that the decision below conflicts with this Court's decision in *Allied Chemical & Alkali Workers* v. *Pittsburgh Plate Glass Co.,* 404 U.S. 157 (1971). The UMW alleges (Petition, pp. 42-43) that this Court stated, in *Pittsburgh Plate Glass,* "that the fair representation duty does not extend to retirees, 404 U.S. at 181 and n.20. . . ." But no such statement is set forth therein.

This Court, in *Pittsburgh Plate Glass,* was concerned with the question as to whether the benefits of retired persons, who were not members of the bargaining unit, were a mandatory subject of bargaining. This Court held that they were not, reasoning that the retired persons were not members of the bargaining unit, that the union therefore had no duty to represent them and the employer had no duty to bargain with respect to their benefits.

Hence the question presented in the instant case, as to whether, once a union undertakes to represent retired persons and the employer agrees to treat with the union on that basis, a federal duty of fair representation arises, was not involved in *Pittsburgh Plate Glass.*

To the extent that the Court touched upon this issue in *Pittsburgh Plate Glass* at all, it suggested that such a duty does exist. The Court affirmatively recognized in *Pittsburgh Plate Glass* that a union could properly represent and bargain for retirees if the employer agreed. The Court also noted, 404 U.S. at 173 (n.12), that "in representing retirees in the negotiation of retirement benefits, the union would be bound to balance the interests of all its constituents. . . ." This duty "to balance the interests of all its constituents" is precisely what the duty of fair representation is all about.

The UMW advances two reasons why a duty of fair representation should not be construed to arise from a union's actual representation of pensioners. First, the union asserts that the imposition of such a duty would

create "a veritable minefield of legal hazards" (Petition, p.45) because, having once undertaken to represent pensioners, the union could be "exposed to a duty of fair representation challenge should it for overall strategic reasons abandon permissive bargaining." (Petition, p.46) But this Court flatly stated in *Pittsburgh Plate Glass* (at 181) that no such duty to continue representation exists. "Having once found it advantageous to bargain for improvements in pensioners' benefits, active workers are not forever thereafter bound to that view or obliged to negotiate in behalf of retirees again."

The UMW contends that the imposition of a duty of fair representation, when a union does in fact undertake to represent retirees, would give rise to "additional legal duties" (Petition, p.46) where none would otherwise exist. But under state law an agent already owes a duty of loyalty and good faith, Restatement, Agency 2d § 13, and the implication of a parallel federal duty, while it has jurisdictional implications, does not functionally alter the nature of the duties required.

There is thus no conflict here presented with any decision of this Court.

D. While isolated facets of dicta in the decision below are not entirely harmonious with a few decisions of other courts, no conflict requiring resolution is presented.

The UMW makes perfunctory obeisance to the requirements of this Court's Rule 19 by referring to a number of decisions from other Courts of Appeals, extracting selected bits of *dicta* from the decision below, and arguing that square and important conflicts are thus shown. It is true that all of the observations of the various Courts of Appeals regarding the meaning and scope of LMRA §§ 301 and 302 are not entirely harmonious, and

in view of the nature of those sections and the complexity of the problems with which they deal, it would be surprising were the situation otherwise.

The UMW argues (Petition, p.43) that the decision below is contrary to the construction of *Pittsburgh Plate Glass* set forth in *Royal Typewriter Co.* v. *National Labor Relations Board*, 533 F.2d 1030, 1039 & n.10 (8th Cir. 1976) and *Bricklayers, etc, International Union* v. *Stuart Plastering Company, Inc.*, 512 F.2d 1017, 1029 (5th Cir. 1975). In *Royal Typewriter Co.* the Court was concerned with the question as to whether, when an employer initially offers to discuss a nonmandatory subject of bargaining with the union, this precludes a subsequent refusal to bargain further on that subject. The Court held, citing *Pittsburgh Plate Glass,* that there was no duty to continue to bargain over what was not a subject of mandatory bargaining in the first instance.

Bricklayers, etc., International Union was concerned with the question as to whether, absent a written pension plan as required by LMRA § 302(c)(5), evidence showing that some payments had been made by the employer could supply the element of definiteness that Congress prescribed. The Court cited *Pittsburgh Plate Glass* for the proposition that past practice between an employer and a union cannot change the written-plan requirement of the law.

Neither *Royal Typewriter Co.* nor *Bricklayers, etc., International Union* had anything to do with the duty of fair representation, and neither is in any way "contrary" to the decision below.

Snider v. *All State Administrators, Inc.*, 481 F.2d 387 (5th Cir. 1973), which is cited by the UMW at eight different points in its Petition, not only presents no conflict but actually supports the decision below. In *Snider,* members of a union sought an injunction and other relief

alleging violations of LMRA § 302. The District Court granted the injunctive relief, but denied all further relief for lack of jurisdiction. The Court of Appeals agreed with the District Court's narrow reading of § 302(e) but held that the District Court had pendent jurisdiction over the related state law claims.

> The exercise of pendent jurisdiction over state law claims is particularly appropriate in actions brought for injunctive relief under Sec. 302(e) because the state claims based on abuse of welfare trusts are closely tied to questions of federal labor policy. See *Giordani* v. *Hoffmann,* 295 F.Supp. 463, 471-472 (E.D.Pa. 1969); *Insley* v. *Joyce,* 330 F.Supp. 1228, 1234 (N.D.Ill. 1971). (at 391-92)

Although it found that the District Court could properly have exercised pendent jurisdiction over the state law claims, the Court in *Snider* held that it did not abuse its discretion in declining to exercise such jurisdiction. In the instant case, the District Court did, in fact, adjudicate the pensioners' claims on the merits, and the Court of Appeals held, consistently with *Snider,* that the District Court had pendent jurisdiction so to do.

The other cases cited by the UMW, in the context of § 302(e), as reflecting conflicts with the decision below,[1] did not present situations in which there was allegation and proof, as in the instant case, of structural violations of § 302(c)(5), nor do any of those cases consider the issue of pendent jurisdiction.

The cases cited as square conflicts in the context of § 301 similarly present no problem. *Miller* v. *Davis,* 507 F.2d 308 (6th Cir. 1974) involved a claim for pension

[1] *Prescription Plan Service Corp.* v. *Franco,* 552 F.2d 493 (2d Cir. 1977), *Lugo* v. *Employees Retirement Fund,* 529 F.2d 251 (2d Cir. 1976), and *Bowers* v. *Ulpiano Casal, Inc.,* 393 F.2d 421 (1st Cir. 1968).

benefits allegedly wrongfully withheld by the pension fund trustees, where jurisdiction was asserted under LMRA § 301(c), 29 U.S.C. § 185(c). The instant action involves subsection (a), not subsection (c). Moreover, the pensioners do not assert that § 301(a) establishes subject matter jurisdiction over claims for improper administration of union trust funds. It is suits for violation of collective bargaining agreements with which § 301(a) is concerned, and in the instant action there is no question that there was pervasive violation by the operators of the provisions of the collective bargaining agreement.

Mumford v. *Glover,* 503 F.2d 878 (5th Cir. 1974) involved a finding by the Court of Appeals that the collective bargaining agreement had not, in fact, been violated, and that there was therefore no basis for § 301 jurisdiction.

It is impossible completely to reconcile every nuance of the cases cited above, either among themselves or each with the opinion in the Court below, but it is submitted that there is no necessity to do so. None of these decisions presents a square conflict with the holding below, and to the extent there is some inconsistency among *dicta* it has been rendered of no moment by the advent of ERISA.

II. AFTER 14 YEARS OF LITIGATION, THREE SEPARATE REFUSALS TO DISMISS BY THE DISTRICT COURT, A PRIOR FINDING OF PROBABLE FEDERAL QUESTION JURISDICTION BY THE COURT OF APPEALS, A TRIAL AND DECISION ON THE MERITS, AND A FINDING BY THE DISTRICT COURT THAT THE FEDERAL LABOR LAWS HAD BEEN VIOLATED, THE COURT OF APPEALS WAS SURELY CORRECT IN HOLDING THAT THE PENSIONERS' FEDERAL CLAIMS WERE NOT SO FRIVOLOUS AS TO AFFORD AN INSUFFICIENT PREDICATE FOR PENDENT JURISDICTION.

Were this Court to grant a Writ of Certiorari, the issue presented would be whether the Court of Appeals erred in its holding that the federal claims shown by the pensioners were of sufficient substance to support the exercise of pendent jurisdiction. It is an important consideration here in weighing the necessity of Certiorari that the result reached by the Court of Appeals was correct.

There can be no question that in 1963, 1965 and 1969, when the pensioners filed their complaints, they found themselves in a jurisdictional thicket. The 1963 and 1965 complaints pre-dated *Vaca* v. *Sipes, supra,* and the 1969 amended complaint pre-dated *Pittsburgh Plate Glass, supra.* In hindsight the jurisdictional averments contained in the pensioners' pleadings may not have been as artful as prescience could have had them, but there are certain points which are clear.

The pensioners in their 1969 amended complaint averred violations of § 302, and the District Court after trial found such a violation to have been proved. As the Court of Appeals below noted, and as the UMW in fact concedes, there is no question that the allegation and proof of structural violations of § 302 establishes federal question jurisdiction. (18a, n.18)

The UMW argues that the pensioners did not assert violations of § 302 until their amended complaint in 1969, by which time the "equal representation" violation had been cured by the 1967 resignation as trustee of UMW District President Brennan. But that was not the only violation averred by the pensioners; it was the only violation found by the District Court to have been proved. The fact that pensioners were unable to persuade the District Court to find other violations does not mean that pensioners' allegation and proof of such violations was frivolous.

The UMW also argues that the allegation of § 302 jurisdiction in the 1969 amended complaint does not relate back, under F.R.C.P. 15(c), to the original complaint. But it is quite clear from the first sentence of Rule 15(c) that such an amendment does relate back. Moreover, the UMW is making this argument in its Petition for the first time,[3] although pensioners, before the Court of Appeals, argued the effect of Rule 15(c) in both their Brief for Appellants and their Reply Brief. It is submitted that this Court should not grant a Writ of Certiorari to consider an argument not raised below.[4]

The key question is whether the § 302 claims asserted by the pensioners, as well as their § 301 claim and their claim under § 1337 for breach of the duty of fair representation, are clearly "immaterial and made solely for the purpose of obtaining jurisdiction. . . ." *Bell* v. *Hood,* 327 U.S. 678, 682 (1946). In *Hagans* v. *Lavine,* 415 U.S. 528, 536-38 (1974), this Court held that a federal claim is insubstantial only if its unsoundness so clearly results from the previous decisions of this Court as to foreclose the subject and leave no room for the inference that the questions sought to be raised could be the subject of controversy.

There has been no such foreclosing decision by this Court, not in 1963, not in 1965, not in 1969 and not today.

The decision of the Court of Appeals below, holding that the pensioners' federal question claims were of sufficient substance to support the exercise of pendent jurisdiction was therefore entirely correct.

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[3] The Court of Appeals noted (18a): "The defendants do not dispute that this was an amendment which, under Fed. R. Civ. P. 15(c), could properly relate back to the filing of the § 301 complaint in 1965."

[4] See also 28 U.S.C. § 1653: "Defective allegations of jurisdiction may be amended, upon terms, in the trial or appellate courts." The intent of Congress in enacting this section was "to avoid dismissals on technical grounds . . . .", *Miller* v. *Davis,* 507 F.2d 308, 311 (6th Cir. 1974), which is exactly the opposite of what the UMW argues for in the instant case.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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